

term agency encompasses any independent agency, proposed § 2641.201(f)(1)(ii) emphasizes that the representational bar extends to contacts with employees of an independent agency in any of the three branches of the Federal Government. Notably, proposed example 1 following § 2641.201(f) as proposed would highlight the fact that Members of Congress and their staffs are not employees of an independent agency in the legislative branch. Proposed § 2641.201(f)(1)(iii) modifies the term “court” with the adjective “Federal” in order to distinguish State or other non-Federal courts. Of course, as has been described in several OGE Informal Advisory Letters, a communication made in a court has “the additional unavoidable intent of attempting to influence and to persuade” a Federal party in the lawsuit, regardless of the forum. OGE Informal Advisory Letter 80 x 6. Moreover, a former employee may be prohibited from contacting Federal employees for use as witnesses or otherwise in connection with a lawsuit in State court. OGE Informal Advisory Letter 82 x 13.

Proposed § 2641.201(f)(1) omits the District of Columbia from the list of entities to or before which communications and appearances may not be made. As clarified in 18 U.S.C. 207(a)(3), the District of Columbia is listed in section 207(a)(1) merely as a consequence of the permanent bar’s applicability to former District of Columbia employees. Thus, a former employee of the District of Columbia is covered by section 207(a)(1) in relation to contacts back to the government of the District of Columbia, but former employees of the executive branch (and of independent agencies) are not restricted by section 207(a)(1) from contacting employees of the District of Columbia.

Our definition of “to or before” in proposed § 2641.201(f)(2)(i) indicates that a communication or appearance will be considered directed to an employee of an agency, court, or court-martial even though not addressed to any particular employee of the entity. We believe it would be inconsistent with the purpose of 18 U.S.C. 207 to permit communications to a Federal entity merely because they are not addressed to a named individual.

In proposed § 2641.201(f)(2)(ii), we specify that a communication or appearance must be directed to an employee “in his capacity as an employee of” an agency, court, or court-martial. Proposed examples 2, 3, and 4 following proposed § 2641.201(f) are illustrative. While a former employee is

not prohibited from lobbying a legislative branch employee at a meeting, example 2 emphasizes that a former employee may not try to influence an employee of an independent agency who is participating in the same meeting. Example 3 indicates that the permanent bar would extend to communications directed to an executive branch employee who is assigned by his agency to carry out official Government duties as a member of the Board of Directors of a non-Federal entity. The employee would be acting in his capacity as an executive branch employee even when, as in the proposed example, he is considering a specific issue of most interest to the private sector entity. (Separately, of course, the issue must be of direct and substantial interest to the current employee’s agency, as described in proposed § 2641.201(j).) The proposed wording of § 2641.201(f)(2)(ii) is also intended to address the situation in which a former employee directs a communication to a former employee in a social setting. Although the current Federal Communications Commission (FCC) employee in proposed example 4 is “off-duty” at the cocktail party, the former employee nevertheless directs his communication to the FCC employee in his capacity as an employee of that agency.

As proposed, § 2641.201(f)(2)(ii) indicates that a former employee does not “direct” his communication to a mere bystander. Beyond this, we considered whether 18 U.S.C. 207(a)(1) should be interpreted as also not extending to a variety of situations in which a former employee directs a communication to a current employee who has no official role in a forum, yet who is participating in the forum as more than a mere bystander. We considered, for example, a number of situations in which a communication is directed to an assembled group. As we observed in OGE Informal Advisory Letter 81 x 5(1) in relation to the scope of section 207(c), the concern is the extent to which section 207 “might require [a former employee] to survey who his audience was before he argued a certain position to any group of individuals.”

Proposed § 2641.201(f)(3) permits a former employee to serve as a speaker if the forum “[i]s not sponsored or co-sponsored by an entity specified in paragraphs 2641.201(f)(1)(i)–(iv) of this section, [i]s attended by a large number of people, and [a] significant proportion of those attending are not employees of the United States.” See OGE Informal Advisory Letters 81 x 5(1), 81 x 5(2). It is our intention that former employees

not be prohibited from addressing what are essentially public forums. The regulation may depart somewhat from past guidance in that it states that employees otherwise permitted to address such fora may engage in debate with any other panel participants or with members of the audience who happen to be current employees without fear of being found to have made a prohibited communication. In a public setting outside the context of official decision-making, such incidental exchanges between participants are still primarily directed towards the audience.

Under proposed § 2641.201(f)(3), private sector sponsorship of a forum, standing alone, does not free a speaker or panel participant from his post-employment restrictions. The forum must be in the nature of a conference, seminar, or similar forum; the audience must be large; and a significant proportion of attendees must be persons other than Federal employees. We considered whether to specify a minimum number of attendees and/or a maximum percentage of Federal employee attendees. In some settings, a communication is directed to so wide an audience that it cannot be said to be made “to” Federal employees in the audience. And while some audiences will plainly fall on one side or the other of a line drawn for this purpose, a precise line as to the size and composition of such an audience cannot be drawn. Former employees should appreciate the risks of violating section 207 before agreeing to address a forum when it is unclear whether proposed § 2641.201(f)(3) applies. In this regard, former employees may be guided by the size of the conference and the proportion of non-employee attendees in proposed example 5.

The regulation would deal with published writings in a similar fashion. A former employee may “permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely-available publication.”

As proposed example 7 would indicate, a communication can be made “to” an employee of the United States if it is conveyed through an intermediary with the intent that the information be attributed to the former employee. A similar point is discussed above in connection with proposed example 5 following § 2641.201(d) as proposed, which would illustrate the distinction between permissible behind-the-scenes activity and communications directed to the Government.